Petition

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In the Supreme Court of the United States

October Term 1981

LENWOOD WILLIAMS, JR.,
Petitioner

v

THE SHIPPING CORPORATION OF INDIA,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
SUPREME COURT OF THE
UNITED STATES

LENWOOD WILLIAMS, JR.,
Petitioner,

v.

THE SHIPPING CORPORATION OF INDIA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUESTIONS PRESENTED

I. Is the Foreign Sovereign Immunities Act, 28 U.S.C. §1330, 1332(a), 1441(d), 1602-1611, unconstitutional in proscribing trial by jury against commercial entities owned by foreign states?

II. May jurisdiction be obtained over a commercial entity owned by a foreign state pursuant to diversity jurisdiction or is the Foreign Sovereign Immunities Act the sole means of exercising jurisdiction over such an entity?

III. Where a longshoreman is injured due to a dangerous condition known to the shipowner and existing prior to the time the stevedore began cargo operations, may the shipowner defend on the grounds that the longshoreman assumed the risk of the open and obvious dangerous condition?

LIST OF PARTIES

Petitioner is Lenwood Williams Jr. Respondent is The Shipping Corporation of India. The United States of America is an intervenor.

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STATEMENT OF JURISDICTION

The date of the decision of the panel of the United States Court of Appeals for the Fourth Circuit sought to be reviewed is July 7, 1981. A petition for rehearing and rehearing en banc was filed. The date of the Court of Appeals' decision denying rehearing is September 8, 1981. The statutory provision conferring jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Seventh Amendment to the United States Constitution

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the States, than according to the rules of the common law.

28 U.S.C. §1330(a)
"The district courts shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state as defined in §1603(a) of this title as to any claim for relief in person am** with respect to which the foreign state is not entitled to immunity either under §1605-1607 of this title or under any applicable international agreement."

28 U.S.C. §1332(a)
The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of

$10,000.00, exclusive of interest and cost, and is between--(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in §1603(a) of this title, as plaintiff and citizens of a State or of different States."

28 U.S.C. §1441(d)
"Any civil action brought in a State court against a foreign state as defined in §1603(a) of this title may be removed by the foreign state to the district court of a United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without a jury."

STATEMENT OF THE CASE

Petitioner Lenwood Williams brought suit in the Circuit Court of the City of Norfolk, Virginia, seeking to recover for injuries he suffered due to the negligence of the respondent while petitioner was working as an employee of Old Dominion Stevedoring Company on board the respondent's vessel, Vishva Aditya. Petitioner demanded a jury in his State court motion for judgment, his initial pleading. The matter was removed by the respondent to the United States District Court for the Eastern District of Virginia upon petition for removal alleging diversity of citizenship and amount of controversy exceeding $10,000.00. Thereafter, respondent moved to strike petitioner's demand for

a jury trial, relying upon the Foreign Sovereign Immunities Act, 28 U.S.C. §1330, 1441, 1602-1611.

Respondent concededly was not immune from suit under the F.S.I.A., but respondent did seek trial of the matter without a jury. Respondent admittedly qualified as a "foreign state" under the definition of 28 U.S.C. §1603. The district court in its memorandum order dated March 10, 1980 upheld the respondent's motion to strike petitioner's jury demand. Thereafter the matter was tried before the court sitting without a jury. After hearing the evidence and argument of counsel, the court found in favor of the respondent shipowner and dismissed the matter on the merits on the grounds that the dangerous condition in

question was open and obvious to the longshoremen and they therefore assumed the risk of injury.

Petitioner appealed to the Court of Appeals for the Fourth Circuit, from the trial court's denial of trial by jury and from the trial court's entry of judgment in favor of the owner. The Court of Appeals, after intervention by the United States of America, affirmed the trial court's denial of trial by jury and found no error in the trial court's decision on the merits.

The facts in the instant case are not in great dispute. The parties were agreed that the defendant owned the vessel VISHVA ADITYA, which was at Norfolk International Terminals on November 4, 1977. On that date defendant hired Old Dominion Stevedoring Co. to come aboard the

vessel to remove certain cargo and reload it. On that date Old Dominion employed plaintiff as a longshoreman to work on board the vessel.

The vessel came into the Port of Hampton Roads with a substantial list. While at sea the vessel apparently encountered some rough seas and suffered a shift in the cargo. The cargo shift created the list in the vessel and necessitated its stop at Hampton Roads. The longshoremen in Hampton Roads were employed to remove cargo which had broken loose from the stow, to off-load it from the vessel, and to re-stow it aboard the vessel properly.

The shifted cargo consisted of bunches of palletized rubber and bundles of tinsheets approximately three (3) feet square. These thin

sheets had been strewn about the hold, having broken their bands during the cargo shift at sea. The edges of the tinsheets were sharp. The tinsheets also had a substance between each sheet which apparently served as some type of preservative. This preservative, described by witnesses as grease or oil, was slippery. In addition, the fact that the tinfoil was strewn throughout the hold created a slippery condition throughout the hold. The slippery condition was known to the longshoremen as soon as they came into the hold. The list in the vessel was obvious to all who looked at the vessel.

The substantial list in the vessel also created a dangerous condition. The angle of the deck and other working surfaces was more dangerous, and

footing was more hazardous. As a result of the dangerous conditions, a longshoreman who worked the ship received "distress" pay, double the prevailing rate. On the other hand, longshoremen are obligated by contract to work distressed vessels. They are not permitted to simply decline such work, but must accept it as assigned.

Petitioner was injured when he lost his footing picking up a tin plate The square of tin plate hit the deck and then bounced back hitting petitioner's wrist, causing a severe laceration.

The basis of Federal jurisdiction in the trial court was diversity of citizenship. The respondent's petition for removal alleged diversity of citizenship and amount in controversy as the basis for removal from state

court to federal court. Respondent later moved to strike petitioner's demand for trial by jury relying upon the F.S.I.A. Respondent apparently now contends that jurisdiction existed only pursuant to that act.

ARGUMENT

1. The Court of Appeals has decided an important question of federal law which has not been but should be settled by this Court.

The Foreign Sovereign Immunities Act, 28 U.S.C. §1330(a), 1332(a), 1441(d), 1602-1611, purports to proscribe trial by jury against foreign states, including commercial entities and corporations owned by foreign states. Prior to the enactment of that statute, such commercial entities were subject to suit in American courts as any other citizen of a foreign state

was. The defense of sovereign immunity was not necessarily available to commercial undertakings of foreign governments. See for example Molina v. Commision Reguladora Del Mercado de Henequen, 91 N.J. 382, 103A 397 (1918); Coale v. Societe Cooperative Suisse Des Charbons, 21 F.2d 180 (1921); United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 119 (S.D. N.Y. 1929); Ulen and Co. v. Bank Gospodarstwa Krajowego, 261 App. Div. 1, 24 N.Y.S. 2d 201 (1940); The Uxmal, 40 F.Supp. 258 (D. Mass. 1941). In other cases, the defense of sovereign immunity, although otherwise available, was deemed waived by the foreign sovereign, for example by treaty or by contract. In such cases where the affirmative defense of sovereign immunity was removed, the foreign

sovereign was then deemed subject to local law as any other party would be. See for example Isbrandtsen Tankers, Inc. v. President of India, 446 F.2d 1198 (2d Cir. 1971); Petro Shipping Corp. v. Kingdom of Greece, 360 F.2d 103 (2d Cir. 1966); Victory Transport Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964); Rich v. Naviera Viacuba, S.A., 295 F.2d 24 (2d Cir. 1961); Chemical Natural Resources Inc. v. Republic of Venezuela, 420 P.A. 134, 215A 2d 864 (1966), cert. denied 385 U.S. 822; National Institute of Aggrarian Reform v. Cane, 153 So. 2d 40 (Fla. App. 1963); Republic of Cuba v. Arcade Bldg. of Savannah, Inc., 104 Ga. App. 848, 123 S.E. 2d 453 (1961); In the Matter of the United States of Mexico v. Schmuck, 293 N.Y. 264 (1944).

Nonetheless, the Foreign Sovereign Immunities Act is being interpreted by the Federal courts to require the proscription of trial by jury in actions against foreign states, including commercial entities or corporations owned by foreign states. The Fourth Circuit Court of Appeals in Williams v. The Shipping Corporation of India, No. 80-1243 (4th Cir. 1981), the Third Circuit in Rex v. Cia Pervana de Vapores, S.A., No. 2335/6 (1981) and the Second Circuit in Ruggiero v. Compania Peruana de Vapores, 639 F.2d 872 (2d Cir. 1981) have all permitted shipping companies owned by foreign states to be sued by longshoremen injured on board those ships only in trials to the court without a jury. Jury demands by the longshoremen have been stricken by the courts as being

proscribed by the FSIA. That interpretation violates the Seventh Amendment to the United States Constitution and is an unwarranted extension of the judicial doctrine of sovereign immunity at the very time when Congress and the international community have retreated from that doctrine.

The Seventh Amendment provides that the right to trial by jury shall be preserved in suits at common law. This Court has recognized that the right to trial by jury extends beyond the common law forms of action recognized in 1791 and requires trial by jury in actions unheard of at common law provided the action involves rights and remedies of the sort traditionally enforced in an action at law rather than in an action in equity or

admiralty. Curtis v. Loether, 415 U.S. 189 (1974); Pernell v. Southall Realty Co., 416 U.S. 363 (1974). The instant action is precisely an action of the sort traditionally enforced in an action at law--it is an action seeking money damages on account of personal injuries suffered by petitioner due to the respondent's negligence. This Court itself recognizes that such actual damages is the form of relief traditionally offered in courts of law. Curtis v. Loether, 415 U.S. at 196. Such a conclusion is in keeping with practice prior to the FSIA in which commercial entities were treated as not immune from suit and were in fact treated as any other party would be.

A review of the development of the doctrine of sovereign immunity in American courts also establishes that

commercial entities were traditionally not immune from suit here. This Court should not permit an extension of that doctrine so as to limit trial by jury.

The doctrine of sovereign immunity has developed from the concept that "the King can do no wrong." This doctrine has meant that the United States cannot be sued in its own courts without its consent. As applied to foreign sovereign states, however, it has been recognized from the beginning of the United States that the judicial jurisdiction of the United States within its own territory is exclusive and absolute. The Schooner Exchange v. McFaddon, 7 Cranch 116, 3 L.Ed. 287, 293 (1812). The United States Constitution specifically provides that the judicial power of the United States includes controversies between a state

of the United States or its citizens and foreign states or their citizens or subjects. United States Constitution, ARTICLE III, SEC. 2.

United States courts have developed the doctrine of sovereign immunity however in which, as a matter of courtesy and comity, foreign sovereigns would not be subjected to local jurisdiction. The Santissima Trinidad and The St. Ander, 7th Wheaton 281, 5 L.Ed. 454, 471 (1822). Accordingly, there is no constitutional impediment to assertion by United States Courts of jurisdiction over foreign sovereigns. There has been a judicial decision to accord to foreign states an exemption from local courts, but there is no constitutional requirement that foreign sovereigns receive such treatment. The doctrine

as originally established by Justice Marshall in the Schooner Exchange spcifically applied only to foreign warships. The rule of sovereign immunity as it developed in America did not apply to commercial activities undertaken by foreign states. The lower federal courts frequently held that commercial activity undertaken by foreign state owned corporations was not protected by sovereign immunity. Not until 1926 did the United States Supreme Court apply sovereign immunity to foreign state owned merchant vessels. Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926). The Berizzi Bros. court noted that in 1812 when the Schooner Exchange was decided merchant ships were operated only by private owners and there was little thought of governments engaging in such

operations, a development which did not come until much later. 271 U.S. at 573.

At the same time the Supreme Court was deciding that sovereign immunity did apply to commercial activities, the international community was deciding that it did not. In 1926 the International Convention for the Unification of Certain Rules concerning the Immunities of State Ships undertook to limit immunity in the area of maritime commerce to ships carrying cargos employed exclusively for public and non-commercial purposes. That convention was signed by twenty nations, including all major powers except the United States of America and the Soviet Union. See Victory Transport Inc., 336 F.2d at 357.

Thereafter, the United States retreated significantly from the concept that sovereign immunity reached commercial activities. In the years from 1948 from 1958 the Department of State negotiated some fourteen treaties in which the parties waived sovereign immunity for state-owned commercial activities. The now famous Tate Letter of 1952 set forth the position of the State Department that commercial activities were not protected by sovereign immunity. This Court also retreated from the rule announced in Berizzi Bros. in the cases of Ex Parte Republic of Peru, 318 U.S. 578 (1943) and Mexico v. Hoffman, 324 U.S. 30 (1945). In fact in Alfred Dunhill of London Inc. v. Cuba, 425 U.S. 682,

702-03 (1976), this Court recognized that Berizzi Bros. was not being accepted in the lower courts. In fact, Justice Frankfurter asserted in his concurring opinion in Mexico v. Hoffman that Hoffman had effectively overruled Berizzi Bros. 324 U.S. at 39.

Once it is determined that the judicial doctrine of sovereign immunity does not--and did not--protect commercial entities from suit, it is clear that the right to trial by jury attaches. This right cannot be restricted by Congress.

> "Broad as the power of the National Government to regulate foreign affairs must be, it is not without limitation. The restrictions confining Congress in the exercise of any of the powers expressly delegated to it in the Constitution apply with equal vigor when that body seeks to regulate our relations with

other nations." Perez v. Brownell, 356 U.S. 44, 58 (1958).

Finally, petitioner calls to the Court's attention the dissenting opinion of Judge Sloviter in Rex v. Cia Pervana de Vapores S.A.. Judge Sloviter's dissent thoroughly explains petitioner's contention herein that the FSIA is unconstitutional in purporting to restrict trial by jury against foreign owned commercial entities. Petitioner urges this Court to consider fully Judge Sloviter's thorough arguments in addition to those set forth in this petition.

Even if the FSIA does properly preclude trial by jury against commercial entities owned by foreign states, the FSIA does not provide the sole means for exercising jurisdiction over foreign-owned commercial entities.

Jurisdiction may still logically obtain under 28 U.S.C. §1332(a)(2) as involving citizens of a state and citizens or subjects of a foreign state. Petitioner here is obviously a citizen of a State, namely Virginia. Respondent is clearly a citizen or subject of a foreign state, namely a corporation of the State of India. There being no proscription of trial by jury under diversity jurisdiction, petitioner would be entitled to a jury trial in such an action. That was exactly the conclusion reached by the Court in Icenogle v. Olympic Airways S.A., 82 F.R.D. 36 (D.D.C. 1979).

This conclusion is amply supported by the record in the instant matter. Respondent removed this matter from State court on allegations of diversity of citizenship and amount

in controversy. Respondent made no mention of the FSIA until later, when it sought to strike the jury demand. Thus respondent proceeded as though it were a foreign corporation with diverse citizenship from petitioner and so represented to the federal courts. It would be consistent then to consider respondent to be just what it considered itself to be--a citizen of a foreign state. Maintenance of the jury as a fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. Dimick v. Schiedt, 293 U.S. 274, 285 (1934), quoted in Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501 (1959). This Court should then strive

to interpret the FSIA in a manner which preserves trial by jury. By permitting suits against commercial entities owned by foreign states to be brought either under the diversity jurisdiction or under the FSIA, this Court would be protecting the right to trial by jury. Such a construction is reasonable in light of the constitutional question which results if trial by jury against commercial entities owned by foreign states is totally prohibited by the FSIA and actions against such entities can only be brought under the FSIA.

Accordingly, in order to protect and preserve petitioner's rights to trial by jury, this Court should grant certiorari to the decision of the Court of Appeals for the Fourth Circuit and review the instant matter.

2. The Court of Appeals decision is contrary to the decisions of this Court.

The trial court's decision on the merits, affirmed by the Court of Appeals, is contrary to this Court's decision in Scindia Steam Navigation Company, Ltd. v. De Los Santos, 68 L.Ed. 2d 1 (1981). The Supreme Court said there that the shipowner has a duty to exercise ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore would be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property. Id. at 12. The trial court here however relied upon the openness and obviousness of the dangerous condition as a defense for

the shipowner. The Court of Appeals panel decision affirmed the District Court's decision on the merits with the comment, "Since we find no error in the District Court's decision on the merits, the judgment is affirmed." The Court of Appeals decision is therefore contrary to the De Los Santos decision. Instead of relying on open and obvious as a defense, the trial court and court of appeals should have looked at the conduct of the shipowner considering all the circumstances of the case to determine if that conduct had been reasonable. There was evidence from the stevedore company's safety director that improper stowage of the cargo overseas had caused the cargo to shift when the vessel encountered strong seas. Such conduct on the part of the shipowner

should have been evaluated by the trial court under this court's standard in Kermarec v. Compagnie Generale Transatlantic, 358 U.S. 625 (1959), which required the shipowner to exercise reasonable care under the circumstances. Because the trial court applied open and obvious as a defense, however, a new trial should be ordered by this Court.

Additionally, the trial court relied upon assumption of the risk as a defense for the shipowner. The trial court stated specifically that "now, certainly the hatch boss, the stevedore, the longshoremen themselves, undertook some assumption of liability in this case." Congress clearly intended that assumption of the risk not be a defense for the shipowner. The Senate Report which

accompanied the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act stated specifically, "The committte intends that the admiralty rule which precludes the defense of "assumption of risk" in an action by an injured employee shall also be applicable... ." S.Rep. No. 92-1125, 92d Cong., 2d Sess. (1972). The Supreme Court recognized as much in the De Los Santos opinion, stating in footnote 22, that the defense of assumption of risk is unavailable in §905(b) litigation, citing Napoli v. Hellenic Line, 537 F.2d 505, 509 (C.A. 2 1976)." Petitioner has consistently argued to both the trial court and the Court of Appeals that it was error to rely upon assumption of the risk as a defense. The panel decision, however, failed to follow this Court's decision in De Los Santos and permitted the trial court to rule

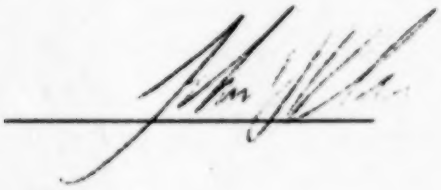
against the longshoreman based upon assumption of the risk. This failure to comply with the De Los Santos decision requires this Court to grant a new trial on the merits.

CONCLUSION

For the reasons set forth herein, because the Court of Appeals for the Fourth Circuit permitted the District Court to apply an improper standard of care to a longshoreman's suit against a shipowner contrary to this Court's decision in De Los Santos, and because the Court of Appeals construed the Foreign Sovereign Immunities Act to unconstitutionally restrict petitioner's Seventh Amendment right to trial by jury in an action seeking money damages for personal injuries, petitioner prays this Court to grant a

writ of certiorari to the Court of Appeals for the Fourth Circuit to review the judgment herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I John H. Klein certify that on December 7, 1981, 40 copies of this Petition for Certiorari were mailed or delivered to the Clerk, United States Supreme Court and three copies were mailed to John R. Crumpler, Jr., counsel for the Respondent, all postage pre-paid.

John H. Klein

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

MEMORANDUM ORDER

This matter is before the Court on defendant's motion to dismiss plaintiff's demand for a jury trial. This case originally was filed in state court, with the motion for judgment being served on August 1, 1979. Plaintiff is a Virginia citizen, and defendant is a corporation owned by the Government of India. The defendant timely exercised its right to remove this case from state to federal court by filing a petition for removal on August 31, 1979.

Defendant contends that it had a right to remove the case under 28 U.S.C. §1330 and 1441(d). Plaintiff, on the other hand, asserts that this Court's

jurisdiction is based upon 28 U.S.C. §1332(a)(2) (diversity of citizenship). Plaintiff further argues that even if this Court's jurisdiction is based upon 28 U.S.C. §1330 and 1441(d), and not upon 28 U.S.C. §1332(a)(2), that Congress has passed a law in violation of this Seventh Amendment right to trial by jury. This Court will set forth and analyze these relevant Code sections in addressing the merits of these contrary positions.

28 U.S.C. §1330 reads in pertinent part:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief inpersonam with respect to which the foreign state is not entitled to immunity... .

Section 1603 defines a "foreign state" as follows:

(a) A "foreign state"...includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in Section 1332(c) and (d) of this title, nor created under the laws of any third country.

Section 1330 was passed by Congress in 1976, when it amended 28 U.S.C. §1332.[1] Prior to the Congres[s]ional amendments of 28 U.S.C. §1332 in 1976,

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[1]These amendments are referred to as the Foreign Sovereign Immunities Act of 1976, Pub. Law No. 44-583, 40 Stat. 2891, as codified at 28 U.S.C. §1330, 1441, 1602-11, amending 28 U.S.C. §1332, 1391, 1441.

§1332(a)(2) read:

> The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds Ten Thousand ($10,000.00) Dollars...and is between...
> (2) citizens of a State, and foreign states of citizens or subjects thereof. (emphasis added).

Federal jurisdiction with regard to "foreign states" was deleted from §1332 and placed in a new section, 28 U.S.C. §1330, as quoted previously in this Order. By eliminating "foreign state" from §1332 and placing it in §1330, it is obvious that Congress intended jurisdiction over a foreign state to be limited to the provisions of §1330. See [1976] U.S. Code Cong. § Admin. News at 6613. Contra Icenogle v. Olympic

Airways, S.A., 82 F.R.D. 36 (D.D.C. 1979) (court reached a different result from that of this Court, but analysis focused on original jurisdiction and not on removal).

Therefore, if defendant in this case is a "foreign state," or instrumentality thereof, rather than a private citizen or corporation merely domiciled in a foreign state, then this Court's jurisdiction rests upon 28 U.S.C. §1330 and not upon 28 U.S.C. §1332. Defendant here is a corporation owned by the Government of India, a foreign state. Section 1330 specifically cross-references to §1603, which section defines a foreign state to include a corporation such as defendant. §1332(a) contains no parallel cross-reference to §1603. Icenogle v. Olympic Airways,

S.A., supra at 38. Therefore, when analyzing §1330, 1332, and 1603 in conjuction with one another, this Court concludes that defendant is a foreign state as defined in §1603, which in turn gives this Court jurisdiction under §1330 and not under §1332.

More importantly, defendant had a right to remove this case pursuant to 28 U.S.C. §1441(d), which reads:

> (d) Any civil action brought in a State Court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury... .

The language of this section clearly indicates that a case so removed shall be tried by the Court without a jury.

Finally, the legislative history in regard to the 1976 Congressional amendments previously discussed, entitled the "Foreign Sovereign Immunities Act of 1976,"[2] also clearly reveals Congress' intent to provide a foreign nation sued in the United States both the right to remove the case to federal court and the right to have the matter tried by the Court without a jury. In effect, a foreign nation is being accorded the same type of sovereign immunity as our government is accorded in our courts, as well as the type of reciprocal immunity we would like to be accorded in a foreign court. This sovereign immunity extends to actions taken

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[2] See note 1 id.

by the foreign nation in a governmental capacity but not for acts taken in a commercial capacity.[3] Moreover, the legislative history supports this Court's initial determination that new section 1330 supersedes old section 1332(a)(2). The foregoing aspects of the legislative history are set forth below:

PURPOSE

The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity.

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[3]There is no contention that the defendant in this suit, The Shipping Corporation of India, is entirely immune from suit, since it was acting in a commercial capacity. The contention is whether federal jurisdiction rests solely on 28 U.S.C. §1330 and §1441(d), which precludes a trial by jury, or on 28 U.S.C. §1332(a), which does not preclude a jury trial.

...

First, the bill would codity the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestonis). This principle was adopted by the Department of State in 1952 and has been followed by the courts and by the executive branch ever since. Moreover, it is regularly applied against the United States in suits against the U.S. Government in foreign courts.

...

SECTION-BY-SECTION
ANALYSIS

This bill, entitled the "Foreign Sovereign Immunities Act of 1976," sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States. It is intended to preempt any other State or Federal law (excluding applicable

international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities. It is also designed to bring U.S. practice into conformity with that of most other nations by leaving sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to "suggestions of immunity" from the executive branch. (See Ex Parte Peru, 318 U.S. 578, 588-589 (1943).

...

Constitutional authority for enacting such legislation derives from the constitutional power of the Congress to prescribe the jurisdiction of Federal courts (art.I, sec. 8, cl. 9; art. III, sec. 1);

to define offenses against the "Law of Nations" (art. I, sec. 8, cl. 10); to regulate commerce with foreign nations (art. I, sec. 8, cl. 3); and "to make all Laws which shall be necessary and proper for carrying into Execution***all*** Powers vested *** in the Government of the United States," including the judicial power of the United States over controversies between "a State, or the Citizens thereof, and foreign States***." (art. I, sec. 8, cl. 18; art. III, sec. 2, cl. 1). See National Bank v. Republic of China, 348 U.S. 356, 370-71 (1955) (Reed J., dissenting); cf. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).

...

SEC. 2. JURISDICTION IN ACTIONS AGAINST FOREIGN STATES

Section 2 of the bill adds a new section 1330 to title 28 of the United States Code, and provides for subject matter and personal jurisdiction of U.S. district courts over foreign states and their political subdivisions, agencies, and instrumentalities. Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. Plaintiffs however, will have an election whether to proceed in Federal courts or in a court of a State, subject to the removal provisions of section 6 of the bill.

(a) Subject Matter Jurisdiction.-- Section 1330(a) gives Federal district courts original jurisdiction in personam against foreign states (defined as including political subdivisions, agencies, and instrumentalities of foreign states). The jurisdiction extends to any claim with respect to which the foreign state is not entitled to immunity under sections 1605-1607 proposed in the bill, or under any applicable international agreement of the type contemplated by the proposed section 1604.

As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. 2402. Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved.

In addition, the jurisdiction of district courts in cases against foreign states is to be without regard to amount in controversy. This is intended to encourage the bringing of actions against foreign states in Federal courts. Under existing law, the district courts have diversity jurisdiction in actions in which foreign states are parties, but only where the amount in controversy exceeds $10,000. 28 U.S.C. 1332(a)(2) and (3). (See analysis of sec. 3 of the bill, below.)

A judgment dismissing an action for lack of jurisdiction because the foreign state is entitled to sovereign immunity would be determinative of the question of sovereign immunity. Thus, a private party, who lost on the question of jurisdiction,

could not bring the same case in a State court claiming that the Federal court's decision extended only to the question of Federal jurisdiction and not to sovereign immunity.

...

SEC. 3 DIVERSITY JURISDICTION AS TO FOREIGN STATES

Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous. The amendment deletes references to "foreign states" now found in paragraphs (2) and (3) of 28 U.S.C. 1332(a), and adds a new paragraph

(4) to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff. These changes would not affect the applicability of section 1332 to entities that are both owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332(c) and (d). See analysis to section 1603(b).

SEC. 4 NEW CHAPTER 97: SOVEREIGN IMMUNITY PROVISIONS

Section 4 of the bill adds a new chapter 97 to title 28, United States Code, which sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states and their political subdivisions, agencies, and instrumentalites.

The specific sections of chapter 97 are as follows:

Section 1602. Findings and declaration of purpose.

Section 1602 sets forth the central premise of the bill: That decisions on claims of foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law.

Although the general concept of sovereign immunity appears to be recognized in international law, is specific content and application have generally been left to the courts of individual nations. There is, however, a wide accepta[n]ce of the so-called restrictive theory of sovereign immunity; that is, that the

sovereign immunity of foreign states should be "restricted" to cases involving acts of a foreign states which are sovereign or governmental in nature as opposed to acts which are either commercial in nature of those which private persons normally perform. This restrictive theory has been adhered to by the Department of State since the "Tate Letter" of May 19, 1952. (26 Dept. of State Bull. 984 (1952)).

Section 1603. Definitions

Section 1603 defines five terms that are used in the bill:

(a) Foreign state.--Subsection (a) defines the term foreign state as used in all provisions of chapter 97, except section 1608. In section 1608, the term "foreign state"

refers only to the sovereign state itself.

As the definition indicates, the term "foreign state" as used in every other section of chapter 97 includes not only the foreign state but also political subdivisions, agencies and instrumentalities of the foreign state. The term "political subdivisions" includes all governmental units beneath[er] the central government, including local governments.

(b) Agency or instrumentality of a foreign state.-- Subsection (b) defines an "agency or instrumentality of a foreign state" as any entity (1) which is a separate legal person, (2) which is an organ of a foreign state or of a political subdivision of a foreign state, or a majority of whose shares or other

ownership interest is owned by a foreign state or by a foreign state's political subdivision, and (3) which is neither a citizen of a State of the United States as defined in 28 U.S.C. 13329c) and (d) nor created under the laws of any third country.

The first criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.

...

SEC.6. REMOVAL OF CASES FROM STATE COURTS

The bill adds a new provision to 28 U.S.C. 1441 to

provide for removal to a Federal district court of civil actions brought in the courts of the States against a foreign state or a political subdivision, agency or instrumentality of a foreign state. In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to Federal forum actions brought against them in the State courts. New subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.

As with other removal provisions, a petition for removal must be filed with the appropriate district court in a timely manner. (28 U.S.C. 1446). However, in view of the 60-day period provided in section 1608(c) in the bill and in view of the bill's preference that actions involving foreign states be tried in federal courts, the time limitations for filing a petition for removal under 28 U.S.C. 1446 may be extended "at any time" for good cause shown.

Upon removal, the action would be heard and tried by the appropriate district court sitting without a jury. (Cf. 28 U.S.C. 2402, precluding jury trials in suits against the United States.) Thus, one effect of removing an action under the new section 1441(d) will be to extinguish a

demand for a jury trial made in the state court. (Cf. rule 81(c), F.R. Civ.P) because the judicial power of the United States specifically encompasses actions "between a State, or the Citizens thereof, and foreign States" (U.S. Constitution, art. III, sec. 2, cl.1), this preemption of State court procedures in cases involving foreign sovereigns is clearly constitutional.

This section, again, would not apply to entities owned by a foreign state which are citizens of a State of the United States as defined in 28 U.S.C. 1332(c) and (d), or created under the laws of a third country.

[1976] U.S. Code Cong. & Admin. News at 6604,6605, 6610, 6611, 6612, 6613, 6614, 6631, 6632 (setting forth the legislative

history to the Foreign Sovereign Immunities Act of 1976, Pub. Law No. 94-583, as contained in H. Rep. No. 94-1487) emphasis added) (footnotes omitted).

Plaintiff has argued that even if the Court determines that federal jurisdiction in this case is founded upon 28 U.S.C. §1330 and/or 28 U.S.C. §1441(d), and not upon 28 U.S.C. §1332(a), then the Congress has passed a law in violation of the Seventh Amendment. This contention is without merit. As indicated by the legislative history, Congress intended to extend long-standing principles of sovereign immunity to foreign states sued in United States' courts. Sovereign immunity, and waiver thereof, embodies the principle that when the sovereign allows itself to be sued, such suit does not carry with it

the right to trial by jury. See, e.g., Glidden v. Zdanok, 370 U.S. 571, 572 (1962). As the Court of Appeals for the Third Circuit aptly stated:

> The question as to whether Government having waived this immunity is entitled to a jury trial is free of the impact of the Seventh Amendment to the Constitution since it is clear that a suit against the sovereign was not a suit at common law within the meaning of the Seventh Amendment. Rather the answer must be sought in well-established principles relating to the waiver of immunity by the sovereign. These may be stated as follows:
>
> (1) "The Government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms

> of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. ***If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the Government to the exercise of the privilege. Nothing more need be said on this subject." McElrath v. United States, 102 U.S. 426, 440, 26 L.Ed. 189 (1880). (emphasis supplied)

Collins v. Government of Virgin Islands, 366 F.2d 279, 282 (3d Cir. 1966), cert. denied, 386 U.S. 958 (1967).

In light of defendant's right to remove this case to federal court under 28 U.S.C. §1330 and 1441(d), and in light of

the clear wording and legislative history of these sections, this Court finds no deprivation of plaintiff's right to a trial by jury under long-standing principles of sovereign immunity. The Court GRANTS defendant's motion to dismiss plaintiff's demand for a jury trial.

Signed by J. Calvitt Clarke, Jr.
United States District Judge
Dated March 10, 1980
Norfolk, VA

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1243

FIELD, Senior Circuit Judge:

The plaintiff, Lenwood Williams, Jr., a Virginia citizen, filed an action in a Virginia state court against the Shipping Corporation of India, a corporation which is wholly owned by the Government of India, seeking to recover damages for personal injuries allegedly sustained by the plaintiff while working as a longshoreman aboard defendant's ship. The defendant corporation is concededly a "foreign state" within the definition of the Foreign Sovereign Immunities Act (hereinafter the "Immunities Act" or "Act"), 28 U.S.C. §1603, includes any corporate entity owned or controlled by a foreign state.[1]

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[1]The Foreign Sovereign Immunities Act of

The defendant removed the case to the federal court, and following removal, moved to strike the plaintiff's demand for a jury trial on the basis of section 6 of the Immunities Act, 28 U.S.C. §1441(d). In resisting the motion, the

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1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §1330, 1602-11 (1976), and amending 28 U.S.C. §1332, 1391, 1441) was enacted Oct. 21, 1976 and became effective ninety days later.

28 U.S.C. §1603 reads in pertinent part as follows:

§1603. Definitions

For purposes of this chapter -

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity -

(1) which is a seperate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States

plaintiff, noting that the removal petition omitted any reference to the Immunities Act, contended that the district court's jurisdiction could properly be based upon diversity of citizenship pursuant to 28 U.S.C. §1332(a)(2) and was therefore removable under 28 U.S.C. § 1441(a) which carries no proscription against a trial by jury in the federal forum. The district court rejected Williams' contention that jurisdiction could be predicated upon diversity under section 1332(a)(2) as an alternative to 28 U.S.C. §1330 and 1441(d). In making this ruling, the court concluded that the Immunities Act constituted the sole jurisdictional basis for suits against a foreign sovereign.

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as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

The court also rejected Williams' contention that the Act violated his Seventh Amendment guarantee to a trial by jury and was, for that reason, unconstitutional. See Williams v. Shipping Corporation of India, 489 F. Supp. 526. On this appeal, the plaintiff challenges both of these rulings of the district court.

In considering the issues on appeal, it is necessary to review briefly the history of foreign sovereign immunity leading up to enactment of the Immunities Act. Historically, a sovereign was regarded as immune from judicial coercion both in its own courts as well as those of other nations although, of course, the immunities rested on differed bases. A sovereign's immunity in its own courts was a matter of right, while in a foreign

court a soverign's immunity was not a right but a privilege which was granted politically by the forum state. The American doctrine of absolute jurisdictional immunity for a foreign sovereign was announced by Chief Justice Marshall in The Schooner Exchange v. McFaddon, 7 Cranch 116 (1812), where he stated that since all sovereigns possess "equal rights and equal independence" under international law, a sovereign enters the territory of a friendly government "in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him." Id. at 136-137.

The Schooner Exchange involved a foreign military vessel and left open the question of the immunity of a commercial vessel owned by a foreign sovereign. In 1926, however, the Court applied the principle of absolute sovereign immunity to commercial vessels of foreign states. Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562. The Court concluded that "the principles [of sovereign immunity] are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sence that warships are." Id. at 574. In the ensuing 20 years the inequities

consequent to carte blanche immunity eventually led to judicial deference to recommendations of exemptions by the State Department. The Court, in effect, moved away from the view that the issue of foreign sovereign immunity was purely a legal question and adopted the view that it was a mixed legal and political question with respects to which determinations of the Executive Branch should be accorded conclusive effect. See Ex Parte Republic of Peru, 318 U.S. 578 (1943) and Mexico v. Hoffman, 324 U.S. 30 (1945). The Court's rationale was stated in Ex Parte Peru:

> [C]ourts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the

Government in
conducting foreign
relations.

318 U.S. at 588.

In 1952, the State Department announced in the now famous "Tate letter"[1] that in making a sovereign immunity determination it would no longer apply the traditional or absolute theory of sovereign immunity, but would henceforth apply the restrictive theory of immunity which had gained currency in most civil law jurisdictions. The "Tate letter", however, contained few guidelines for distinguishing between public and commercial acts, and did nothing to depoliticize immunity decisions. In Victory Transport, Inc. v.

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[1] Letter of May 19, 1952 from Acting Legal Advisor Jack B. Tate to Acting Attorney General. 26 Dept. State Bull. 984-85 (1952), reproduced in Alfred Dunhill of London, Inc., v. Cuba, 425 U.S. 682, 711 (1976).

Comisaria General, 336 F.2d 354, (1964), cert. denied, 381 U.S. 934 (1965), the Second Circuit, noting that courts of other countries had applied the restrictive immunity doctrine with widely divergent results, held that a foreign government's charter of a vessel to transport wheat was a commercial act, regardless of its underlying public purpose, and stated that it would deny claims of sovereign immunity except for "the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive." 336 F.2d at 360. Supreme Court's subsequent denial of certiorari did little to clarify the uncertain parameters of the restrictive theory of immunity.

In addition to the uncertainty of jurisdictional immunity, there was no satisfactory procedure by which a judgment against foreign entities could be enforced, and even in cases in which a foreign sovereign was not accorded jurisdictional immunity, absolute immunity from execution of judgment often produced a right without any effective remedy.[2] It was against this ambiguous and confusing background that the Congress considered and passed the Immunities Act in 1976.

The Immunities Act codified the restrictive theory of sovereign immunity, and its broad purpose, as stated by the House Committee on the Judiciary, is "to provide when and how parties can maintain

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[2]Reeves, The Foreign Sovereign Before United States Courts, 38 Fordham L. R. 455,455 (1970)

a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." H.R. Rep. No. 94-1487, 94th Cong., 2nd Sess. [1976] 5 U.S. Code Cong. & Ad. News 6604, 6604. The Act is designed to accomplish four objectives:

> First, it codifies and amplifies the restrictive theory of foreign sovereign immunity.
>
> Second, it depoliticizes the issue of sovereign immunity and places on the judiciary the responsibility of deciding whether in a given case a foreign sovereign is entitled to immunity.
>
> Third, it provides a statutory "long-arm" procedure for obtaining in personam jurisdiction over foreign sovereigns, while eliminating

quasi-in-rem jurisdiction based on the attachment of property of a foreign state.

Fourth, it provides judgment creditors specific remedies for the satisfaction of judgments against a foreign state and disposes of traditional absolute immunity from execution.

The Act established comprehensive and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states in either federal or state courts in the United States. Under the legislative scheme a plaintiff may bring a foreign state or one of is agencies or instrumentalities before an American court, obtain a ruling on the sovereign immunity of the entity,

and if an immunity is not found to exist secure an adjudication and satisfaction of the plaintiff's claim.

The greater part of the legislation, both substantive and procedural, was included in section 4 of the bill, and is codified in 28 U.S.C. §1602 through 1611. However, to implement the legislative pattern the Congress found it necessary to modify the subject matter jurisdiction of federal district courts. The most notable change under the Act is the jurisdictional grant under section 2(a) which adds new section 1330 to Title 28 of the United States Code. Section 1330 reads in pertinent part as follows:

> (a) The district courts shall have original jurisdiction without regard to amount in controversy or any nonjury civil action against a

> foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is ot entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

The legislative rationale for this jurisdictional change is stated in the House Report:

> Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desireable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences. Plaintiffs, however,

> will have an election whether to proceed in Federal court or in a court of a State, subject to the removal provisions of section 6 of the bill. [i.e., 28 U.S.C. 1441(d)]
>
> * * * *
>
> As in suits against the U.S. Government, jury trials are excluded. See 28 U.S.C. 2402. Actions tried by a court without jury will tend to promote a uniformity in decision where foreign governments are involved.

H.R. Rep., supra. [1976] 5 U.S. code Cong. & Ad. News at 6611-12.

The congressional concern for having claims against foreign states and their agencies heard by judges only is reflected in section 6 of the bill which adds new subsection (d) to section 1441 of title 28 of the United States Code providing for the removal of actions

against foreign states from state to federal courts at the option of defendants. New subsection (d) reads in pertinent part as follows:

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal

the action shall be tried by the court without jury.***

The legislative analysis of §1441(d) states:

> The bill adds a new provision to 28 U.S.C. 1441 to provide for removal to a Federal district court of civil actions brought in the courts of the States against a foreign state or a political subdivision, agency or instrumentality of a foreign state. In view of the potential

sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts.

* * *

Upon removal, the action would be heard and tried by the appropriate district court sitting without a jury. (Cf. 28 U.S.C. 2402,

> precluding jury trials in suits against the United States.) Thus, one effect of removing an action under the new section 1441(d) will be to extinguish a demand for a jury trial made in the state court.

H.R. Rep., supra, [1976] 5 U.S. Code Cong. & Ad. News at 6631-32 Both the statutory language and the legislative history evince the congressional desire to achieve uniformity of decisional law in the area of suits against foreign sovereigns.

To conform the existing diversity statute with the new 28 U.S.C. §1330 and the definition of "foreign state" contained in section 1603, it was necessary to amend the provisions of 28 U.S.C. §1332. This complementary change was effected by section 3 of the bill. Prior to amendment, §1332 read:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between--
> (1) citizens of different States:
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

After amendment, §1332(a) reads:

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between--
> (1) citizens of different States;
> (2) citizens of a State and citizens or subjects of a foreign state:
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

The net effect of the amendment was to delete the references to diversity jurisdiction <u>against</u> "foreign states" found in former sections 1332(a)(2) &

(3), and to add a new subsection (4) providing for diversity jurisdiction only in actions brought by foreign states as plaintiffs. The exclusivity of the jurisdictional provisions of the Immunities Act is recognized in the House Report:

> Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. Since jurisdiction in actions against foreign states is comprehensively treated by the new

section 1330, a similar jurisdictional basis under section 1332 becomes superfluous. The amendment deletes references to 'foreign states' now found in paragraphs (2) and (3) of 28 U.S.C. 1332)a), and adds a new paragraph (4) to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff. These changes would not affect the applicability of

section 1332 to entities that are both owned by a foreign state and are also citizens of a state of the United States as defined in 28 U.S.C. 1332(c) and (d). See analysis to section 1603(b).

H.R. Rep., supra, [1976] 5 U.S. Code Cong. & Ad. News at 6613.

The plaintiff contends that despite the deletion of "foreign states" from section 1332(a)(2) and its conclusion in new section 1330(a), his action could have been filed originally in the federal forum on the jurisdictional basis that it was an action between "citizens of a

State and citizens or subjects of a foreign state" under section 1332(a)(2). Building upon this premise, the plaintiff suggests that his case was properly removable under section 1441(a). In making this argument the plaintiff relies upon two district court decisions. Rex v. Cia. Pervana de Vapores, 493 F.Supp. 459 (E.d. Pa. 1980) and Icenogle v. Olympic Airways, S.A., 82 F.R.D. 36 (D.D.C. 1979). In each of those cases the district court avoided what it discerned to be a serious constitutional question by construing the Act to permit alternative jurisdiction under section 1332(a)(2) and/or section 1331.[3] These

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[3]Each of those cases involved actions orginally filed in the district court, and the opinions seem to indicate that considerations applicable to the question of original jurisdiction would not necessarily apply to a case removed to the federal forum pursuant to 28 U.S.C. 1441(d). We find such a bifurcated

courts reasoned that since section 1603, which falls within chapter 97, begins with the words "For purposes of this chapter", the definition of "foreign state" does not extend to section 1332 which is found in chapter 85. Aside from the fact that we cannot accept this hypertechnical analysis of the legislation, we note that section 1330(a), which is also found in chapter 85, refers spcifically to section 1603(a). This argument further ignores the fact of the jurisdictional modifications in the Immunities Act specifically refers to section 1603 for

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analysis of the jurisdictional sections of the Act to be unwarranted. "Congress wished to provide a single vehicle for actions against foreign states or entities controlled by them, to wit, §1330 and §1441(d), its equivalent on removal, and to bar jury trial in each."

Ruggiero v. Compania Peruana De Vapores, etc. 639 F.2d 872, 878 (2d Cir. 1981)

the definition of a "foreign state". We are in accord with the observations made by Judge Friendly with respect to this alternative jurisdiction argument in Ruggiero v. Compania Peruana De Vapores, etc., 639 F.2d 872 (2 Cir. 1981). In rejecting such an argument, he stated:

> We are convinced that no such option exists. The argument ignores the provision of §1330(a) which defines each of these defendants as a foreign state. The same entity cannot be both a foreign state and a citizen or subject to a foreign state. The historic justification for considering foreign corporations to be citizens or subjects of the state of incorporation was that their shareholders were citizens or subjects of that state,***and that the suit must be regarded as against them.

Section 1603 destroys that fiction with respect to the entities therein defined by providing that for the purposes of the Immunities Act they are to be regarded as states themselves. The conclusion is inescapable from the language of the statute that Congress meant §1330 to be the exclusive means whereby a plaintiff may sue any foreign state as defined in §1603(a), at least on the basis of diversity jurisdiction theretofore provided in §1332(a)(2), and that this entails a non-jury trial.

* * *

The courts must learn to accept that, in place of the familiar dichotomy of federal question and diversity jurisdiction, the Immunities Act has created a tripartite division-federal question cases, diversity cases and actions against

> foreign states. If a case falls within the third division, there is to be no jury trial even if it might also come within one of the other two. Id. at 875-76.

In our opinion, the plain reading of the statutory language, the legislative history and the overriding purpose of the Immunities Act requires the conclusion that sections 1330 and 1441(d) are jurisdictionally exclusive and bar the plaintiff from a jury trial whether this case is filed originally in the district court or is one removed from a state court.

We turn now to the constitutional question. The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved***." The Amendment does not

"purport to require a jury trial where none was required [at common law]." Atlas Roofing Co. v. Occupational Safety Comm'n., 430 U.S. 442, 459 (1977). "[I]f the action is a common law suit or the particular issues arise in a common law of England as to that type of action, then there is no right to jury trial by virtue of the Seventh Amendment." 5 Moore's Federal Practice Par. 38.05[5] at 38-55. Our review of the cases discloses nothing which would indicate that a right of jury trial existed under the common law in 1791 with respect to a suit against a foreign government since, because of its recognized sovereign immunity, such a suit could not be maintained at all.

That a suit against a foreign state was unknown to the common law in this country is clear from the opinions in The Schooner Exchange v. McFaddon and Berizzi Bros. Co. v. S.S. Pesaro, supra. The recognition of the immunity of a foreign sovereign in this country paralleled the common law of England. Although it is extremely doubtful that the King of England was ever suable without his consent, the authorities agree that, in any event, no such right of action existed after the reign of Edward I (1272-1307). See historical review an discussion, Briggs v. Light-Boats, 11 Allen, (Mass.) 157, 166-74 (1865). The extension of such immunity to foreign sovereigns was also recognized in the English courts, and in 1880 the Court of Appeals held that there was no valid

distinction at common law between military and commercial vessels for the purposes of such immunity. In The Parlement Belge, (1880) 5 Prob. Div. 197 (C.A.), [1874-80] All E.R. 104, a Belgian government owned vessel employed primarily as a mail carrier between Belgium and England, but also engaged in carrying passengers and freight, rammed an English steam tug. Since the vessel was not a warship and was not engaged exclusively in public activities, the court felt compelled to decide whether it had jurisdiction otion by determining "whether every part of the public property of every sovereign authority in use for national purposes is not as much exempt from the jurisdiction of every court as is the person of every sovereign." Id. All E.R. at 109. The

court painstakingly reviewed the cases on the subject, including the decisions in The Schooner Exchange and Briggs v. Light-Boats, supra, and was persuaded that the law of nations recognized a "public property" class of things that was considered exempt from the jurisdiction of the territorial sovereign's courts. Ships of war were considered to be merely a member of this larger exempt class. The court concluded:

> [t]he principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence and dignity of every other sovereign State, each and every one declines to exercise by means of its courts any of

> its territorial jurisdiction***over the public property of any State which is destined to public use***.

Id. All E.R. at 115

We think it is manifestly clear that in 1791 a suit against a foreign government could not be maintained in either the courts of America or England.

It has been on this basis that the Supreme Court has consistently upheld the denial of jury trials in those instances where the United States has from time to time waived its immunity from suit. The rationale of the court was stated in McElrath v. United States, 102 U.S. 726, 426 (1880):

> There is nothing in these provisions [denying a jury trial] which violates either the letter or spirit of the Seventh Amendment. Suits against the government

in the Court of Claims, whether reference be had to the claimant's demand, or to the defence, or to any set-off, or counter-claim which the government may assert, are not controlled by the Seventh Amendment. They are not suits at common law within its true meaning. The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleadings and the rules of practice to be observed in such suits.

The Court's position on this issue was reiterated in Galloway v. United States, 319 U.S. 372, 388 (1943):

It may be noted, first, that the [seventh] Amendment has no application of is own force to this case. The suit is one to enforce a monetary claim against the United States. It hardly can be

> maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign.

See also Glidden Company v. Zdanok, 370 U.S. 530, 572 (1962).

In our opinion this rationale applies with equal force to suits against foreign sovereigns since such actions were also unknown to the common law of England and this country when the Amendment was adopted. In addition to the historical basis for such a conclusion, it is also supported by sound policy considerations. The same fundamentals of international policy which influenced Chief Justice Marshall to recognize the absolute immunity of a foreign state in The Schooner Exhange were also approriate for consideration

by the Congress in its decision to eliminate jury trials when it created jurisdiction over suits involving foreign sovereigns. Again we are in accord with the observations of Judge Friendly in Ruggiero v. Compania Peruana De Vapores, etc., supra, at 880-81:

> We do not at all mean by this that the Seventh Amendment can be avoided simply because that seems a good idea; we mean that there are sufficient reasons why newly authorized suits against foreign sovereigns, authoritatively

determined to have
been unknown to the
common law in 1791,
are sui generis and
should not be deemed
to be within the scope
of the Seventh
Amendment's
preservation of jury
trial.

Williams also relies upon Pernell v. Southall Realty, 416 U.S. 363 (1974) and Curtis v. Loether, 415 U.S. 189 (1974), to carry the day for him in his constitutional challenge. Those cases merely reaffirmed the principle announced by Mr. Justice Story in Parsons v. Bedford, 3 Pet 433, 446

(1830), that the term "suits at common law" as used in the Seventh Amendment embraces

> not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those were equitable rights alone were recognized, ***.

In the years since Parsons v. Bedford was decided, however, the Supreme Court has repeatedly held that the Seventh Amendment has no application to suits against the United States - even to suits in which legal rights were to be determined or monetary damages were sought. McElrath v. United States, Galloway v. United States, and Glidden Company v. Zdanok, supra. To invoke the

Amendment, it is not enough that the nature of the plaintiff's action is "legal" rather than maritime or equitable; the action must also be brought against a defendant who was suable at common law in 1791. Since foreign sovereigns were immune from such suits at common law, we find McElrath and is progeny controlling.

We agree with the district court's interpretation of the Act and, similarly we reject the plaintiff's constitutional argument. Since we find no error in the district court's decision on the merits, the judgment is affirmed.

A F F I R M E D.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 80-1243

LENWOOD WILLIAMS, JR.,
Appellant,

v.

THE SHIPPING CORPORATION OF INDIA,
Appellee.

ORDER DENYING REHEARING

Upon consideration of the petition for rehearing and for rehearing en banc;

Now, therefore, with the concurrence and approval of the other members of the panel, and in the absence of a request for a poll of the entire court,

it is ADJUDGED and ORDERED that the petition fo rehearing be denied.

Signed by United States Senior Circuit Judge

Widener, Circuit Judge, concurring:

While I believe a part of the reasoning of the district court may be subject to question in view of Scindia Steam Navigation Co., Ltd. v. De Los Santos, 49 L.W. 4405 (1981), and Harris v. Reederei, No. 78-1830 (4th Cir. 1981), both later decided, I think it should be noted that the district court based its decision on liability on two alternate grounds in addition to the common point discussed in Scindia and Harris. Both of the additional alternate grounds are wholly factual, and are supported by the record. Therefore, the judgment of the district court as to liability should be affirmed, I think, and rehearing denied.